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No. .....

In The

Supreme Court of the United States

October Term, 1982

KEARNEY & TRECKER CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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December 29, 1982

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QUESTIONS PRESENTED

Is a partial, temporary taking of control over a manufacturer's facility a taking under the Fifth Amendment?

Did the Directive issued to Kearney & Trecker Corporation by the United States Department of Commerce, Office of Industrial Mobilization, to change its production schedule, which change delayed deliveries to customers of Kearney & Trecker Corporation, and which delays resulted in a cancelled order, constitute a compensable partial taking of Kearney & Trecker Corporation's property?

PARTIES

The parties to the proceedings in the United States Court of Claims, the judgment of which is sought to be reviewed, are all listed in the caption of this case in this Court. Kearney & Trecker Corporation is a wholly owned subsidiary of Cross & Trecker Corporation.

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OPINION BELOW

The opinion and judgment of the Court of Claims, *Kearney & Trecker Corporation v. The United States,* — Ct. Cl. —, 688 F. 2d 780 (1982) and the order of the Court of Claims denying Kearney & Trecker Corporation's motion to alter or amend judgment, *Kearney & Trecker Corporation v. The United States,* — Ct. Cl. —, — F. 2d —, Case No. 477-81C (1982), appear in the Appendix to this petition.

JURISDICTION OF THIS COURT

The opinion and judgment of the United States Court of Claims which granted the United States' motion for summary judgment in this case was rendered and entered on September 8, 1982. The order of the United States Court of Claims denying Kearney & Trecker Corporation's motion to alter or amend judgment was entered on September 30, 1982. This petition for writ of certiorari is filed within 90 days of that order. The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

United States Constitution Amendment V: See App. 11.

Defense Production Act of 1950, 50 U. S. C. App. § 2061 *et seq.*: See App. 12.

DPS Reg. 1, 32A C. F. R. Part 651 (1980): See App. 22.

STATEMENT OF THE CASE

This is a claim for just compensation under the Fifth Amendment to the United States Constitution for a taking by the Department of Commerce, on behalf of the Air Force, of the property of the Petitioner by appropriation of the Plaintiff's production facilities by a delivery Directive which resulted in the absolute loss of a sale previously made to Rolls Royce, Ltd.

Petitioner is a manufacturer of heavy industrial production machinery. On November 22, 1979 Rolls Royce,

Ltd. ordered a sophisticated and complex piece of industrial machinery from Petitioner, who accepted the order and scheduled delivery for January, 1981. This delivery date was rescheduled to September, 1981 due to a labor strike at Kearney & Trecker Corporation's plant. The fixed price for the machine, known as a Five Axis Modu-Line Traveling Column Machining Center, was $682,480.00.

Lockheed-California Company ordered a Five Axis Modu-Line Traveling Column Machining Center from Petitioner on December 21, 1979. This order was accepted by Petitioner, and delivery was ultimately scheduled for November, 1981. The fixed price for this machine was $656,080.00.

On November 6, 1980 the Department of Commerce, International Trade Administration, Office of Industrial Mobilization, ordered Petitioner to ship the machine ordered by Lockheed by June 30, 1981. This order was in the form of a directive issued pursuant to the provisions of the Defense Production Act of 1950, 50 U. S. C. App. 2061, *et seq.*, and the regulations promulgated pursuant thereto.

Petitioner advised the Office of Industrial Mobilization that it could produce only two such machines per month, and that compliance with the Directive would necessitate providing Lockheed with a machine being produced for another of Petitioner's customers.

Petitioner proceeded to comply with the Directive, and moved the order for the Lockheed machine to the production position previously held by Rolls Royce, Ltd. Petitioner was thereby unable to deliver to Rolls Royce as scheduled, and Rolls Royce cancelled its order.

Petitioner filed its claim for just compensation under the Fifth Amendment in the United States Court of Claims under 28 U. S. C. § 1491, seeking compensation for its right to use and control its property, which the Government appropriated when it issued its Directive. The measure of damages is Petitioner's reasonable incremental profit expectations wholly and irretrievably lost when Rolls Royce, Ltd. cancelled. The Government entered a general denial, and moved for summary judgment.

The Court of Claims held that the loss was incidental to the governmental action, and the Government was not required under the Fifth Amendment to pay for losses incidentally suffered as a result of directives issued pursuant to the Defense Production Act, or for frustration of contract expectations. It then granted the Government's motion for summary judgment.

On September 30, 1982, the Court of Claims denied Petitioner's motion to alter or amend the judgment.

REASONS FOR GRANTING THE WRIT

The Court should grant a writ of certiorari in this case for two reasons, both of which are of national interest: First, this is a case of first impression involving just compensation under the Fifth Amendment that has been incorrectly decided by the Court of Claims. Second, the decision of the Court of Claims affects countless manufacturers and businesses which are required to comply with the requirements of the Defense Production Act of 1950, 50 U. S. C. App. § 2061 *et seq.*

1. The first sentence of the opinion of the Court of Claims begins, "In this case of first impression, . . ." (App. 1). The opinion then improperly extends existing law to the facts of this case, and concludes that Kearney & Trecker Corporation is not entitled to compensation under the Fifth Amendment.

Petitioner has never contended it was not paid the contract price for the Modu-Line it manufactured, sold and delivered to Lockheed. Rather, Petitioner has maintained from the inception of this case that it has not received compensation from the United States for losses which would not have been suffered but for the Governmental Directive.

The Court of Claims is correct when it states in its opinion that Kearney & Trecker Corporation negotiated the purchase price for the Modu-Line with Lockheed prior to the commencement of the machine's production and before the taking occurred. The opinion below is incorrect when it states Petitioner's contract with Lockheed was "cost plus a fixed fee" (App. 2, 5), and it is misleading when it says, "In the circumstances, the negotiated price constitutes just compensation for the Modu-Line itself." (App. 6)

At the time Petitioner and Lockheed entered into the contract for the Modu-Line, the delivery date was December 15, 1981, and the price was specifically set at $656,080.00. This delivery date was confirmed only after petitioner determined its production schedule for other customers. When the Office of Industrial Mobilization directed Petitioner to accelerate the delivery of the Modu-Line for Lockheed, it required Kearney & Trecker Cor-

poration to award Rolls Royce's production position to Lockheed.

Petitioner's contract with Rolls Royce obligated it to manufacture and deliver a Modu-Line to Rolls Royce by September, 1981. By entering into this contract, Petitioner acquired the right to produce and deliver a Modu-Line by a date certain, and to realize a profit on this sale.

The Directive issued seized Petitioner's rights to use its property in its business without confiscatory interference by governmental action with its contract with Rolls Royce.

This concept was discussed by the Court in *Penn Central Transportation Co. v. City of New York,* 438 U. S. 104, 124 (1978), and was referred to as the Government's interference with "investment backed expectations."

In discussing when the Government's actions require just compensation under the Fifth Amendment, this Court noted:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment backed expectations are, of course, relevant considerations. *Id.*

The Directive, without question, seized petitioner's rights, its investment backed "production facilities" and expectations, with the damages measured by the lost contract it had with Rolls Royce. The Fifth Amendment to the Constitution compels the government to provide just compensation for this taking.

The Court of Claims relied on *Omnia Corp. v. United States,* 261 U. S. 502, in determining that the Directive did not affect a taking of Petitioner's property. This reliance is misplaced. In *Omnia, supra,* the plaintiff had a contract with a steel manufacturer to purchase a large supply of steel. The government requisitioned one full year's production of steel from the steel manufacturer prior to delivery to the plaintiff. Omnia, which was a customer of the appropriated plant, brought suit seeking compensation for the taking of its contract. The Court held this was not a compensable taking of *Omnia's* contract since this was a "consequential loss," *Omnia, supra,* 261 U. S. at 510, and "It [contract] was not appropriated, but ended." *Id* at 511.

The Court of Claims failed to distinguish that the plaintiff in *Omnia, supra,* was not directly subjected to the Governmental action, whereas the Petitioner in this case was the one upon which the impact directly fell. In seeming to follow *Omnia, supra,* the Court of Claims states, "The government did not appropriate any of the rights the plaintiff had under the contract [with Rolls Royce] but only made it impossible for the plaintiff to perform it." (App. 8). Therein not only lies the difference between this case and *Omnia* but also brings into sharp focus the court's error. One of Petitioner's basic rights as manufacturer was to use its plant and equipment to fulfill its contracts and use the incremental profit therefrom. This investment backed expectation is essential to each of Petitioner's contracts. The appropriation of the production facilities with the concomitant right to fulfill its business purpose is not "consequential", but rather is itself the taking.

The Court of Claims' position that the loss by Petitioner is "consequential" as in *Omnia,* and therefore not compensable, is at odds with the facts and previous authority. The term "consequential damage" is not a term of art in constitutional law, and was not defined by the Court of Claims in its opinion.

This Court has previously provided compensation for damages resulting from the Government's taking, including compensation for damages which could have easily been termed consequential. In *Kimball Laundry Company v. United States,* 338 U. S. 1 (1949), the Government temporarily took occupancy of plaintiff's laundry plant and paid the plaintiff compensation for the value of the building and its equipment over the term of the occupancy. On writ of certiorari to the United States Court of Appeals for the Eighth Circuit, this Court held that Kimball Laundry was entitled in addition to be reimbursed for the trade routes it had lost as a result of the Government's taking of the physical laundry plant. The compensable taking of Kimball Laundry's trade routes is analogous to the Government's appropriation of Petitioner's production schedule and the contractual rights which would have been enjoyed but for the dominion exercised by the Government.

Kimball's physical plant was taken and compensation was paid. In *Kimball, supra,* this Court found that an incorporeal right was also taken, trade routes that involved third parties. The taking of these trade routes was a *consequence* of the physical taking of the plant, yet they were so integral with the actual physical laundry plant that compensation was awarded. Here, payment has been made for the physical machine, the Modu-Line, but

an integral part of this physical taking is a production position and contractual rights Petitioner had with its customers, one of whom was Rolls Royce. The taking of these incorporeal property rights was not an incidental occurrence of the Directive. Once the Directive was issued no other result could occur but that the production portion and rights of Petitioner with Rolls Royce would be taken. But for the act of the Government the plaintiff would have sold two machining centers instead of one. *Kimball, supra,* applies to this case, and accordingly Petitioner should be compensated for the taking.

This direct taking for which the Petitioner seeks to be compensated may not be quite as obvious as other direct takings where the taking is of all facilities. However, it is not the form of the taking that determines if it is compensable under the Fifth Amendment, but the substance. To constitute a taking under the Fifth Amendment it is not necessary that property be absolutely "taken" in the narrow sense of that word to come within the protection of this constitutional provision. It is sufficient if the action by the government involves a direct interference with or disturbance of property rights. See *Eyherabide v. United States,* 345 F. 2d 565 (Ct. Cl. 1965).

For example, it has been stated by this Court, it is,

> "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign (which) constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter to amount to a taking." *United States v. General Motors Corp.,* 323 U. S. 373, 378 (1945)

2. The decision by the Court of Claims in this action affects not only the petitioner and the Office of Industrial Mobilization. It affects every manufacturer which the government orders to utilize its property to comply with its orders or Directives under Defense Production Act of 1950, *supra*.

There can be no doubt that the legal question, considered by the Court of Claims to be one of first impression, is before this Court in a factual context of considerable importance.

In its pamphlet entitled *Keeping Defense Programs on Schedule, Defense Materials System and Defense Priorities System* (December, 1976), the Department of Commerce expressed well the scope and significance of the defense priorities system:

> Although the Nation is at relative peace, the issue of preparedness for national defense emergencies still looms as an important factor in the shaping of our national policies. The international setting still dictates that a major effort be made to insure our national security and to lend credibility to our foreign policy initiatives. The very size and scope of our defense program dramatically reflects this concern.
>
> Almost all Americans are familiar with foreign military aid programs, the large number of military bases placed strategically around the world, space and atomic energy projects, and the international alliances such as NATO; but not all Americans are familiar with other Governmental endeavors which, though less well known, contribute significantly to the security of the United States. Two of these lesser-known operations are the Defense Priorities System and the Defense Materials System.
>
> The Defense Priorities System (DPS) and the Defense Materials System (DMS) are bodies of Govern-

ment regulations and orders promulgated under the authority of the Defense Production Act of 1950 (DPA) as amended, designed to accomplish two main purposes. First, the systems help to insure that defense programs are maintained on schedule by providing priority treatment for the purchase of products and materials by defense agencies, contractors, subcontractors and their suppliers. This is accomplished by directing the flow of materials and products to the Nation's military, atomic energy, and space, production or construction programs. These programs are referred to hereinafter as "defense programs". Second, the operation of the systems results in the maintenance of an administrative means by which the total economic resources of the country could be mobilized should the need arise.

Despite the relatively easy supply situation which exists today with respect to most materials, the usefulness of the systems is not diminishing. On the contrary, the priority treatment currently provided under DPS and DMS insures a timely flow of materials and components to programs which are vital to our national security. Examples of such programs readily come to mind: Aircraft, nuclear and other energy developments, missiles, and the equipment needed to maintain the combat readiness of the military forces are all of obvious importance to our national security. Other less obvious programs which are important to the security of our Nation also operate under the systems; the Trans-Alaska pipeline to mention but one.

Recognizing the tremendous importance of these programs as well as considering the enormous sums appropriated for defense, *the operation of the systems represents a very small premium we are paying for substantial insurance coverage.* Even in times of generally ample supply, certain materials and components can become relatively scarce for various reasons. In some cases unusual specifications create design problems as well as supply difficulties. Supply situa-

> tions may change overnight as a result of strikes or unforeseeable international incidents. Economic fluctuations may also affect the availability of materials needed for defense programs. [The operations of the Defense Materials System and the Defense Priorities System mitigate the adverse impact of these various industrial economic factors on defense programs.]
>
> A strong and ready industry is as much a part of our national defense as is a competent military organization. Industry's contribution to our national security is immeasurable. It must be our common purpose to maintain, in peacetime, a defense posture of sufficient strength and credibility to deter aggression and to have at hand the means for mobilizing should the need arise. (Emphasis added.)

The issue which must be squarely faced by this Court is whether that insurance premium is to be paid only by the specific manufacturer affected by a given priorities directive, or whether that burden is more appropriately shared by the public at large.

The late Justice William O. Douglas of this Court stated the principle well in his dissenting opinion in *United States v. Caltex*, 344 U. S. 143, 156 (1952):

> It seems to me that the guiding principle should be this: Wherever the government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss.

The effect of the decision below is that the government is immune from liability under the Fifth Amendment when it issues orders or directives under the authority of the *Defense Production Act of 1950*, and thereby confiscates property and contractual rights from manufacturers. This extraordinary result is visibly at odds with the basic

philosophy of the Fifth Amendment to the Constitution. Resolution of this vital case should not be left to a lower court, which is the only court likely to consider the question in view of the Court of Claims jurisdiction over the Fifth Amendment claims in excess of $10,000.00. This issue needs to be resolved now by this Court.

CONCLUSION

For all of the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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